

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:	:	
	:	
JOHN YAKIM,	:	
	:	
Requester,	:	
	:	
v.	:	No. AP 2018-1645
	:	
GREGG TOWNSHIP,	:	
	:	
Respondent.	:	
	:	

RESPONDENT'S RESPONSE TO REQUESTER'S APPEAL

The Respondent, Gregg Township, hereby files this Response to Requester's Appeal, stating in support thereof as follows:

I. Factual Background

In this matter involving the Pennsylvania Right to Know Law ("Law"), 65 P.S. §§ 67.101 to 67.3104, Requester John Yakim filed a Standard Right to Know Request Form with Respondent Gregg Township ("Township") on September 11, 2018. Mr. Yakim's request was as follows:

Please provide all emails to or from
Kerimiller.greggtownship@gmail.com for January 2018.

Standard Right-to-Know Request Form (Sep. 11, 2018).

Jennifer Snyder is the Right-to-Know officer for Gregg Township. In her attestation, Ms. Snyder confirms that, on September 12, 2018, the Township responded to Mr. Yakim's request. *Snyder Attestation* ¶ 3. Ms. Snyder was able to respond quickly to this request because she had recently received a request for the same emails. *Id.* ¶ 5. As such, Ms. Snyder had already performed a reasonable search for these records and could easily provide the same records to Mr.

Yakim. *Id.* ¶ 6. Ms. Snyder withheld a single email involving a legal matter with the Township's counsel. *Id.* ¶¶ 7-8. Mr. Yakim now appeals, contending that the one withheld email does not fall within the attorney-client privilege.

II. Legal Argument: The Township Has Provided All Responsive, Non-Privileged Emails to Mr. Yakim.

The Township provided all but a single email to Mr. Yakim. *Id.* ¶ 7. The withheld email involved a communication between a supervisor, Ms. Miller, and her counsel, Scott Coburn, in which Ms. Miller sought advice on a legal matter. *Id.* ¶¶ 7-8.

The Law excludes records subject to a privilege from the definition of "public record." 65 P.S. § 67.102. The Law defines privilege as "[t]he attorney-work product doctrine, the attorney-client privilege, the doctor-patient privilege, the speech and debate privilege or other privilege recognized by a court interpreting the laws of this Commonwealth." *Id.* In order for the attorney-client privilege to apply, an agency must demonstrate that: 1) the asserted holder of the privilege is or sought to become a client; 2) the person to whom the communication was made is a member of the bar of a court, or his subordinate; 3) the communication relates to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing either an opinion of law, legal services or assistance in a legal matter, and not for the purpose of committing a crime or tort; and 4) the privilege has been claimed and is not waived by the client. *Nationwide Mut. Ins. Co. v. Fleming*, 924 A.2d 1259, 1263-64 (Pa. Super. Ct. 2007).

The Township has met this standard. As set forth above, Ms. Miller consulted with counsel for the Township, the communication related to a fact of which the attorney was informed by his client, without the presence of strangers, and the privilege has not been waived.

III. Conclusion

For the reasons set forth above, the Respondent, Gregg Township, respectfully requests that the appeal filed by the Requester, John Yakim, be denied.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "D. Gaines", is written over a horizontal line.

David S. Gaines, Jr.
Pa. I.D. No. 308932
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(814) 234-1549 FAX
dgaines@mkclaw.com
Counsel for Respondent

Dated: September 24, 2018

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

JOHN YAKIM,

Requester,

v.

GREGG TOWNSHIP,

Respondent.

No. AP 2018-1645

ATTESTATION OF JENNIFER SNYDER

I, Jennifer Snyder, make the following attestation under the penalty of perjury:

1. I am the Right to Know Officer for the Respondent, Gregg Township.
2. I received a Standard Right to Know Request Form from John Yakim on September 11, 2018, which requested the following information:

Please provide all emails to or from
Kerimiller.greggtownship@gmail.com for January 2018.

3. I responded to Mr. Yakim's request on September 12, 2018. A copy of that request to extend is included with Ms. Grove's appeal.

4. Shortly after responding to Mr. Yakim's request, I provided him with a corrected version of the Township's response. A copy of the corrected response is attached hereto as Exhibit 1.

5. On August 16, 2018, Michelle Grove filed a Right to Know Request with the Township seeking all of Ms. Miller's emails for January and February of 2018. The response to that request is now pending before the Office of Open Records at docket number AP 2018-1517. A copy of the Township's response to that appeal is attached hereto as Exhibit 2.

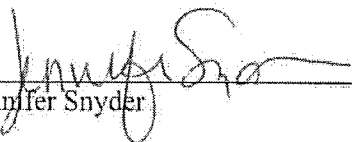
6. I provided Mr. Yakim with the January of 2018 emails that I had previously compiled for Ms. Grove's request, with just one exception.

7. The only email that I withheld from the response to Mr. Yakim's request was an email involving a communication in which Ms. Miller, a supervisor in the Township, sought clarification on a legal issue with the Township's joint counsel, Scott Coburn.

8. Mr. Coburn is joint counsel for the Township on matters relating to a prior request involving security footage in the Township. A copy of the joint counsel agreement is attached hereto as Exhibit 3.

9. The email referenced above, in which Ms. Miller sought clarification on a legal issue, involved matters falling within the joint counsel relationship set forth above.

10. I hereby certify that the facts contained in the foregoing Attestation are true and correct to the best of my knowledge, information, and belief, and that I make this Attestation subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.


Jennifer Snyder

Dated: September 17, 2018

EXHIBIT 1



Right-To-Know Response Form

Gregg Township
106 School Street PO BOX 184
Spring Mills PA 16875
814-422-8218
secretary@greggtownship.org

September 13, 2018

John G. Yakim
1033 Harvard Road
Monroeville PA

Dear Requestor:

This letter acknowledges that your request for access to public records under the Pennsylvania Right-to-Know Law, as set forth in your Standard Right-to-Know Request Form dated September 11, 2018, is hereby granted in part and denied in part. You requested the following information:

*January 2018 ALL EMAILS to/from
KeriMiller.GreggTownship@gmail.com

The granted records are attached. The remaining document, responsive to this request, is denied because it falls under, and is protected by, the attorney-client privilege.

You have a right to appeal this denial of information in writing to Erik Arneson, Executive Director, Office of Open Records, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, Pennsylvania, 17120.

If you choose to file an appeal, you must do so within fifteen business days of the mailing due date of the agency's response, as outlined in 65 P.S. § 67.1101. Please note that a copy of your original Right-to-Know request and this denial letter must be included when filing an appeal. The law also requires that you state the reasons why the record is a public record and address each of the reasons the Authority denies your request. Visit the Office of Open Records website at <http://openrecords.state.pa.us> for further information on filing an appeal. If you have further questions, please call me at the contact information provided above. Please be advised that this correspondence will serve to close this record with our office as permitted by law.

Respectfully,

Jennifer Snyder

Jennifer Snyder, CGA
Secretary/Treasurer/Right to Know Officer

EXHIBIT 2

JOINT LITIGATION AND COMMON INTEREST AGREEMENT

This Joint Litigation and Common Interest Agreement (this "Agreement") is entered into as of March 15, 2018 between Gregg Township, a second class township organized under the laws of the Commonwealth of Pennsylvania ("Township"), and the Pennsylvania State Association of Township Supervisors ("PSATS"), an association representing second class townships, of which the Township is a member. The Township and PSATS are referred to individually as a "Party" and collectively as the "Parties."

RECITALS

A. The Township has been the target of numerous requests filed under the Commonwealth's Right to Know Law ("RTKL"), 65 P.S. § 101 *et seq.*, by Michelle Grove, a township resident, including one that is the subject of an appeal before the Commonwealth Court captioned *Grove v. Gregg Township*, 1186 CD 2017 ("Court Action").

B. PSATS is an association that represents and lobbies on behalf of second-class townships, and has an interest in the Court Action, given its potential implications to the entirety of PSATS' membership.

C. As the Parties' interests are aligned, they therefore wish to consider, study, and evaluate common facts, issues and possible joint legal strategies relating to the Court Action.

D. The Parties have determined that it may be in their best interests to share from time to time legal theories and memoranda, interpretations, analysis and work product; strategies; regulatory and legislative options, proposals and communications; briefs and pleadings; documents and instruments; and other communications and material (in any form or format) otherwise protected by the attorney-client privilege, work product doctrine or any other applicable privilege, protection, right or immunity ("Joint Litigation Information") in order to jointly protect and defend the Parties' common interests.

E. The Parties desire not to waive or risk losing, directly or indirectly, the benefits and protections of the attorney-client privilege, the work product doctrine or other applicable privileges, protections, rights and immunities due to the sharing, directly or indirectly, of such information and material.

AGREEMENT

The Parties, in consideration of the promises set forth herein, hereby agree as follows:

1. Each of the Parties acknowledges that it may be in the Parties' best interests (a) to share Joint Litigation Information between or among themselves and their counsel, witnesses, consultants and advisors and/or (b) to pool the Parties' work product and other Joint Litigation Information. The terms of this Agreement shall apply to Joint Litigation Information shared pursuant to clause (a) above or to work product or other Joint Litigation Information pooled pursuant to clause (b) above. The disclosure of Joint Litigation Information by one Party to another Party shall be entirely voluntary. Notwithstanding anything to the contrary in this Agreement, Joint Litigation Information does not include any information or materials

designated by the Party or counsel disclosing them as not constituting Joint Litigation Information. Joint Litigation Information shall not refer to or include final versions of pleadings, testimony, briefs and discovery papers served by a Party or upon a third party.

2. The disclosure or exchange of Joint Litigation Information pursuant to this Agreement shall not waive any attorney-client, work product or other applicable privilege, protection, right or immunity that may exist with respect to such Joint Litigation Information or abrogate or diminish the confidentiality of such Joint Litigation Information. Each Party agrees that all Joint Litigation Information exchanged pursuant to this Agreement is communicated in confidence for the purposes of securing or communicating legal advice and representation, and is therefore subject to: (a) the work product protection, the attorney-client privilege and any other applicable privilege, protection, right or immunity belonging to the Party conveying the information, which may not be waived without the prior written consent of the disclosing Party and (b) the terms of this Agreement.

3. Subject to Paragraph 4, to ensure the confidentiality of Joint Litigation Information and to preserve the attorney-client privilege, the work product protection or other applicable privilege, protection, right or immunity belonging to the disclosing Party, each Party agrees not to, without the written consent of the disclosing Party, give, show, make available or communicate in any way any Joint Litigation Information it receives from a disclosing Party to anyone other than: (a) the other Party, including its and their respective officers, directors, supervisors, employees, agents, advisors and representatives who have a need to know such information; (b) the attorneys for each of the Parties, legal assistants, and regularly employed office staff working on the RTKL matters; and (c) independent consultants or advisors retained by the Parties for the purpose of assisting with the preparation and conduct of the RTKL litigation issues; provided, however, that the independent consultant or advisor must agree in writing to the confidentiality provisions of this Agreement prior to reviewing any Joint Litigation Information.

4. If a Party is served with or subject to a subpoena, document request or other legal process or legal disclosure requirement (a "Request") requiring or seeking production of or testimony about Joint Litigation Information of the other Party, the Party served with or subject to the Request shall: (a) if permitted by law, promptly inform the other Party about the Request so that the other Party is provided a reasonable opportunity to object to and/or move to quash the Request; and (b) assert all applicable privileges, protections, rights and immunities (including the attorney-client privilege, the work-product immunity, and the joint litigation/defense privilege). If the privilege or immunity claim or other protection or right is challenged, the burden of preserving the privilege, immunity, protection or right shall be on the Party that originally produced the Joint Litigation Information, and such Party shall use reasonable efforts to so preserve such privilege, immunity, protection or right and shall bear all out-of-pocket costs, expenses and fees relating to the Request, or any subsequent proceedings arising thereafter, incurred by the other Party in connection therewith. In the event that either Party wishes to waive the attorney-client privilege and/or work-product immunity and produce its own Joint Litigation Information, it shall so inform the other Party in writing in advance of such waiver and production; provided, however, that a Party may not waive any such privilege or immunity if such waiver would extend to the other Party's Joint Litigation Information. Inadvertent disclosure by a Party of Joint Litigation Information received from the other Party shall not waive any attorney-client privilege, work-product protection or other applicable privilege,

protection, right or immunity attached to the disclosed materials and the inadvertently disclosing Party shall act expeditiously to retrieve such materials.

5. The Party seeking to identify its own Joint Litigation Information submitted to the other Party may mark documents or otherwise tangible Joint Litigation Information exchanged with the following designation (or any similar designation):

**PRIVILEGED AND CONFIDENTIAL
WORK PRODUCT DOCTRINE
PURSUANT TO JOINT LITIGATION AND COMMON
INTEREST AGREEMENT**

The absence of such designation, however, shall not be construed as a waiver of any applicable privilege, protection, right or immunity.

6. In the event that any provision of this Agreement shall be held by any court of competent jurisdiction to be void or unenforceable as applied in any particular circumstance, such provision shall have no force or effect as applied in such circumstance, but its unenforceability in such circumstance shall neither affect nor impair the enforceability of such provision in any other circumstance or impair the enforceability of any other provision of this Agreement to the maximum extent permitted by applicable law.

7. Until this Agreement is terminated, all obligations under this Agreement shall continue in effect.

8. Each Party is free to withdraw from this Agreement at any time by giving prior written notice to the other Party, in which case this Agreement shall no longer be operative with respect to information disclosed after the effective date of such withdrawal. This Agreement shall continue to protect all Joint Litigation Information disclosed to a Party and each Party shall continue to be bound by this Agreement with regard to any Joint Litigation Information learned or obtained by it prior to withdrawal.

9. The Parties understand and agree that this Agreement is entered into in good faith and has no purpose other than to facilitate their handling of the Court Action and other potential litigation or administrative actions relating thereto.

10. The Parties agree that this Agreement shall be governed by and construed in accordance with the laws of Pennsylvania without regard to conflicts of laws principles, except to the extent that other applicable state or federal law may govern matters relating to the claim of attorney-client privilege or the privilege of joint and common defense.

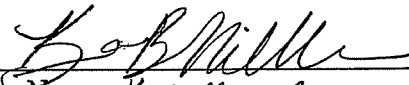
11. This Agreement represents the entire agreement of the Parties with respect to the subject of the preservation of claims of attorney-client privilege, work product protection or the privileges attendant to common legal interests.

12. The terms of this Agreement may not be amended, modified or waived except by an instrument in writing signed by both Parties.


13. This Agreement may be signed in separate counterparts, each of which shall be binding on the Parties who are signatory to any counterpart.

IN WITNESS WHEREOF, the undersigned have executed this Joint Litigation and
Common Interest Agreement as of the date first written above.

Gregg Township

By: 
Name: BOB MILLER
Title: Supervisor

Pennsylvania State Association of
Township Supervisors

By: 
Name: _____
Title: Executive Director

BEFORE THE PENNSYLVANIA OFFICE OF OPEN RECORDS

IN THE MATTER OF:

JOHN YAKIM,

Requester,

v.


GREGG TOWNSHIP,

Respondent.

No. AP 2018-1645

CERTIFICATE OF SERVICE

I, David S. Gaines, Jr., hereby certify that a true and correct copy of this Response to Requester's Appeal was served by electronic mail addressed to jyakim@aol.com on this twenty-fourth day of September, 2018.



David S. Gaines, Jr.

Dated: September 24, 2018